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LATHAM & WATKINS LLP

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BY ELECTRONIC FILING
Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Ex Parte* Presentation in WC Docket No. 04-313 and CC Docket No. 01-338, Unbundled Access to Network Elements ("UNEs"), Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

Dear Ms. Dortch:

On behalf of ACS of Anchorage, Inc., ACS of Alaska, Inc., and ACS of Fairbanks, Inc. (collectively, "ACS"), we offer these supplemental comments in response to some of the *ex parte* presentations that have been made in the UNE remand proceeding. We respectfully request that you include these comments in the above-captioned dockets.

Summary

In prior pleadings in this proceeding, ACS has proposed a three-part test for establishing when facilities-based competition in a market is sufficient to discontinue mandatory access to all UNEs, including enterprise and mass-market loops (the "ACS Impairment Test"). Under this test, there would be no finding of impairment where a competitive local exchange carrier ("CLEC") (i) has captured 30 percent or more of the local exchange market (as defined by the Commission), (ii) has deployed distribution facilities that pass 60 percent or more of the customers in the market (so defined), and (iii) has actually begun providing local exchange and exchange access services to customers over some portion of its own distribution facilities in that market. In a market in which there is no impairment, as defined by this test, the CLEC's ability and incentive to cease purchasing facilities from the incumbent local exchange carrier ("ILEC") will have been established. The ILEC will continue to have an economic incentive to offer its facilities to the CLEC on a wholesale basis, but will be free to do so on market-based terms freely negotiated between the parties. Thus, the goals of the Communications Act will be satisfied without mandating access to UNEs on regulated terms.

I. UPON A FINDING OF NON-IMPAIRMENT IN THE ANCHORAGE MARKET, ACS WILL CONTINUE TO OFFER UNE ACCESS

In its Comments and Reply Comments, ACS presented the Commission with legal and factual evidence demonstrating that under the three-part ACS Impairment Test, in the absence of mandated UNEs, Anchorage CLECs would not be "impaired" within the meaning of

the statute. In particular, ACS proposes that the Commission should presume no impairment with regard to enterprise and mass market loops in the ACS of Anchorage's local exchange serving area. ACS explained that General Communication, Inc.("GCI") has deployed its own switching and transport facilities throughout the Anchorage market, and GCI has never ordered any unbundled switching, transport, dark fiber or DS-1 or DS-3 loops, nor has GCI ever ordered UNE-P, from ACS of Anchorage. ACS further demonstrated that, with respect to both residential and business customers, GCI is unimpaired as to DS-0s and smaller capacity loops, because it has captured more than 30 percent of the Anchorage local exchange market (nearly 50 percent, in fact), and its fiber and cable distribution facilities pass more than 60 percent of the customers in the market (over 95 percent of all households, in fact); and GCI actually is providing local exchange services over a portion of its own facilities in the Anchorage market.[1]

In a market that meets the ACS Impairment Test, a CLEC has gained substantial market share, has deployed distribution facilities to a majority of customers in the market, and has shown an ability and the initiative to provide local exchange services over those facilities to effectively compete with the ILEC. However, eliminating mandatory unbundling will not mean an end to competition or even an end to UNE access. Where a CLEC meets the ACS Impairment Test for a market, it serves the business interest of the ILEC to lease UNEs at reasonable, market-based rates, rather than terminate access to its network. Once the ACS Impairment Test has been met, the ILEC will have lost sufficient market share that UNE access regulation no longer would serve the goals of the Communications Act.[2]

GCI is the incumbent cable television operator in Anchorage with an established presence and substantial market share in the long-distance voice and Internet access markets. GCI has garnered at least 45 percent market share of the local exchange market, and is in the process of transitioning the entirety of its local exchange customer base – nearly half of the total Anchorage market -- to its own circuit-switched cable plant and fiber optic facilities.[3] Some of these facilities reach customers to which ACS itself lacks any facilities-based access.[4]

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1 ACS Comments at 14; ACS Reply Comments at 13; *Ex Parte* Letter of Karen Brinkmann filed in WC docket 04-313, Dec. 3, 2004, and accompanying slides (hereinafter "ACS December 3 Ex Parte").

2 For example, ACS currently serves *less than 50 percent* of the local exchange market in Anchorage. *See* ACS December 3 Ex Parte.

3 *See id.* (GCI already serves roughly 30% of its Anchorage customers over its own facilities, and has announced plans to move at least 60% of its customers to its own facilities, in the next year, and 100% by year-end 2006).

4 *See* Affidavit of Howard A. Shelanski in Support of ACS Comments in Docket R-03-07 before the Regulatory Commission of Alaska, dated January 12, 2004, at 21, attached as Exhibit A to the Comments of ACS of Anchorage, Inc. in WC Docket 04-313 and CC

Under these market conditions, ACS has every incentive to continue to provide UNEs to CLECs even after that access is no longer mandatory. For each customer that a CLEC transitions away from ACS UNEs to competing telephony facilities, ACS loses revenue. Thus, ACS must provide UNEs on reasonable terms in order to retain UNE customers. Additionally, as stated, ACS cannot reach certain customers over its own facilities. If ACS hopes to negotiate for access to customers that it can reach only over CLEC facilities, ACS has an incentive to provide reciprocal access to its own UNEs. In fact, ACS has demonstrated its willingness and good faith to negotiate unbundling arrangements. For example, in its rural markets, ACS and GCI have entered an agreement whereby ACS will provide GCI access to UNE-P at negotiated rates effective until January 1, 2008. ACS entered into this agreement despite the substantial uncertainty regarding whether the Commission will no longer mandate that ILEC's make UNE-P available.

These options may be more cost intensive or less profitable than providing service over mandated UNEs. However, mere inconvenience does not qualify as impairment. As the Supreme Court noted, a CLEC is not impaired "in its *ability* to provide services--even impaired in that ability 'in an ordinary, weak sense of impairment,' . . . -- when the business receives a handsome profit but is denied an even handsomer one."[5]

More fundamentally, ACS questions any impairment test that would find CLECs "impaired" even though the incumbent's market share has dipped below 70 percent, and where one or more competitive carriers provide local exchange service over its own facilities, which already are deployed throughout the study area. CLECs may argue that by including a market share factor, the ACS Impairment Test sets a limit on how fast CLECs can grow once the test is met. Even assuming *arguendo* that competitive growth may slow once the ACS Impairment Test is met, Section 252 was *not* enacted to speed a CLEC's efforts to use the ILEC's own facilities to *surpass* the ILEC. The purpose of the Commission's unbundling rules is to facilitate CLEC market entry, not CLEC market dominance. There must be a point at which a CLEC no longer should enjoy the advantages of regulated UNE access, and should be required to advance its market share position based on market-based UNE access, total service resale, and the CLEC's own facilities deployment. The ACS Impairment Test provides the Commission with a reasonable proxy for determining when mandatory UNE access should cease and market-based competition should be allowed to flourish.

II. THE ACS IMPAIRMENT TEST COMPLIES WITH SUBSTANTIAL COURT PRECEDENT THAT INSTRUCTS THE COMMISSION TO EXAMINE INDIVIDUAL MARKETS

Section 251(c)(3) of the Communications Act is intended to facilitate market entry, not to aid CLEC's to surpass the ILEC in market share and market power. As ACS

Docket 01-338, filed Oct. 4, 2004 (noting GCI has exclusive loop facilities to two subdivisions).

5 *Iowa Utilities, supra,* at n.11.

demonstrated in its *Comments* and *Reply Comments* in this proceeding, the U.S. Supreme Court and the D.C. Circuit both have made clear that the Commission may not "proceed by very broad national categories when there is evidence that markets vary decisively" in terms of impairment.[6] ACS has demonstrated that a national impairment finding would not be legally sustainable where, as in Anchorage, the Commission has been presented substantial evidence of non-impairment. Especially in areas where the ILEC has lost substantial market share, the law must presume that there is no impairment, until some is proven.[7]

Although ACS has argued in favor of a "market" definition that encompasses the entire service area of ACS of Anchorage, for ease of administration ACS could envision a Commission rule in which the market characteristics in each ILEC wire center were separately evaluated. While ACS believes some wire centers may be too small to constitute an economic "market" under most analyses, ACS acknowledges that the Commission would have an unwieldy task in separately evaluating and defining the geographic boundaries of each and every UNE market without some bright-line test such as this. Therefore, ACS would not object to a geographic market definition that grouped customers into "markets" according to the ILEC wire center with which their service is associated. However, if the FCC determines to proceed with a "wire center" analysis, ACS cautions that "wire center" must be defined to clarify that it does not mean areas served by remote switches or other devices in the field.

The ACS Impairment Test provides ample grounds for a finding of non-impairment in any market. ACS concedes that none of the three individual criteria would demonstrate non-impairment if analyzed separately. The proposed criteria must be read in conjunction. Loss of market share by the incumbent combined with a movement by competitors to their own facilities that are deployed to a substantial percentage of customers clearly demonstrates a lack of impairment.[8] These criteria are consistent with the Commission's earlier findings that facilities deployment by CLECs can demonstrate lack of impairment whether or not a wholesale market has evolved.[9] The Commission also has recognized the importance of inter-modal alternatives, and that facilities-based competitors need not have reached profitability (for

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6 *USTA v. FCC*, 359 F.3d 554, 573 (D.C. Cir. 2004).

7 *E.g., AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 391-392 (1999) ("*Iowa Utilities*") ("Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine on a rational basis *which* network elements must be made available . . . .")

8 *See, e.g.,* Shelanski Affidavit, *supra*, note 5.

9 *See, e.g., Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advance Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, at ¶¶ 94-95 (2003).

example while they are still deploying facilities) in order to pose a viable alternative to ILEC UNEs.[10]

III. THE COMMISSION'S FORTHCOMING *ORDER* SHOULD SPECIFY AN EXPEDITED PROCESS TO COMPEL PROMPT RESOLUTION IN MARKETS WHERE IMPAIRMENT IS AT ISSUE

As noted, ACS of Anchorage is well past the point of dominance in its service area. In fact, with its share of the local exchange market reduced to less than 50 percent, ACS is substantially harmed by the continued imposition of unbundling requirements in Anchorage. Therefore, to the extent the Commission sees fit to continue requiring any unbundling in Anchorage, ACS urges the Commission to include in its forthcoming decision a clear, quick process for resolving claims of non-impairment in contested markets. ACS suggests that, at a minimum, these rules should permit an ILEC to petition this Commission to be relieved of its remaining unbundling obligations, and define the relevant geographic market (*i.e.*, specify those wire centers) in which it seeks this relief. The Commission would permit affected CLECs in the market to oppose such a petition within 14 days of filing (ILECs could be required to serve affected CLECs with the petition) but the issues they may raise should be limited to market share evidence that differs from that cited by the ILEC. In the event of opposition by a CLEC, the Commission should compel the production of market share data by all carriers in the market, including counts of lines, trunks, switches, customers and other relevant information, within 30 days of such opposition. Unless the Commission affirmatively denies such a petition, the petition should automatically be deemed granted 90 days after the date of filing. CLECs would have a maximum of 90 days from then to transition to new arrangements.

IV. THE COMMISSION SHOULD NOT MANDATE UNE-P ON A CUSTOMER-BY-CUSTOMER BASIS

Finally, ACS opposes last-minute efforts to require the offering of the UNE platform ("UNE-P") in situations in which ILEC network facilities cannot accommodate multi-hosting. Such a finding would go against settled economic principles and presume that each customer is its own "market." The Commission's impairment analysis should be based on a reasonable definition of "market" sufficiently large as to constitute an area that is economically viable for competitive entry – the area served by a wire center being the minimum such area. Where UNE access is not mandated for an entire market, it would be inappropriate to nonetheless find impairment as to individual customers. Such a finding would provide improper incentives, encouraging continued use of UNEs rather than CLEC investment in facilities.

Moreover, in Anchorage, where legacy network architecture, such as non-multi-hostable digital loop carrier facilities ("DLCs"), mean that CLECs cannot get direct access to an

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[10] *Id.* ¶¶ 95-97. The D.C. Circuit also cited with approval the Commission's reliance on intermodal competition in some of its prior analysis. *See USTA v FCC*, 359 F.3d 554 (D.C. Cir. 2004).

unbundled loop from their existing switch, the CLEC nevertheless is unimpaired because in most cases, it can reach the customer via its own cable or fiber distribution facilities. As further alternatives, the CLEC can deploy its own DLC to obtain access to the loop, or provide service to the customer via total service resale. All of these options are available to GCI for the eight or nine percent of Anchorage loops where non-multi-hostable DLCs are a factor. As to the Fairbanks and Juneau markets, there is no issue regarding access to loops due to non-multi-hostable DLCs, since the CLEC and ILEC negotiated a contractual right to UNE-P in those areas, independent of any regulatory obligation.

More fundamentally, in competitive markets where the ILEC has lost all indicia of "dominance," such as Anchorage, CLECs should be encouraged to become true facilities-based competitors, and not continue to ride on the backs of the ILEC long after the competitive market has matured. Therefore, once a finding of non-impairment has been made, the Commission should reject proposals to perpetuate UNE-P access on a customer-by-customer basis.

Conclusion

For the foregoing reasons, ACS urges the Commission to adopt the ACS Impairment Test and find no impairment in markets such as Anchorage in which facilities-based CLECs have gained substantial market share. Please direct any questions concerning this matter to me.

Very truly yours,

/s/ Karen Brinkmann
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